Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1997

CONNECTICUT BOARD OF PARDONS, ET AL
Petitioners

v.

DAVID DUMSCHAT
Respondent

JAMES BROWN, STANLEY CZAJA and
JAMES SHELTON
Intervening Respondents

CONNECTICUT BOARD OF PARDONS, ET AL
Petitioners

v.

JAMES BROWN, STANLEY CZAJA and
JAMES SHELTON
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners, who consist of the membership of the Connecticut Board of Pardons, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit wherein

following an order from the Supreme Court remanding the case to the Second Circuit the latter Court held in part, as follows:

> "Upon reconsideration, we affirm our earlier conclusions that (1) the consistent issuance of pardons to inmates serving life sentences in Connecticut has given them a protected 'liberty' interest in the pardons process, and (2) the due process rights which attend this protected interest require that life inmates receive written explanations of adverse decisions by the Board of Pardons. We remand to the district court to determine at what point in an inmate's incarceration the likelihood of his receiving a pardon becomes sufficiently great to vest him with a protected 'liberty' interest and due process rights." See Appendix pp. 4a-5a.

This judgment and opinion of the Second Circuit were rendered following the order of the Supreme Court in *Connecticut Board of Pardons, et al v. David Dumschat, et al*, No. 78-1533, entered on June 11, 1979 which provided as follows:

"The motion of respondents for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Second Circuit for further consideration in light of *Greenholtz v. Inmates of Nebraska Penal Complex*, 442 U.S. (1979)." See Appendix p. 17a. See also, _____ U.S. _____, 99 S.Ct. 2854 (1979).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, not yet reported, appears in the Appendix at pp. 1a-16a.

The previous opinion of the United States Court of Appeals for the Second Circuit upon which the order of the Sup-

reme Court of June 11, 1979, was based, appears in the Appendix at p. 18a, and is reported in 593 F.2d 165 (2d Cir. 1979).

The opinion of the District Court for the District of Connecticut appears in the Appendix at p. 21a, and is reported in 462 F.Supp. 509 (D.Conn. 1978). Incorporated in its decision is an earlier decision from the District Court in *Dumschat v. Board of Pardons*, 432 F.Supp. 1310 (D.Conn. 1977).

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Second Circuit were rendered on March 20, 1980. This Petition for a Writ of Certiorari was filed within ninety days of this date.

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Has the practice of the Connecticut Board of Pardons in reducing the minimum terms of inmates sentenced to life sentences in Connecticut thus accelerating their eligibility to be considered for release to the community by the Connecticut Board of Parole given such inmates after serving an as yet judicially undetermined amount of time, a protected liberty interest such that the Due Process Clause of the Fourteenth Amendment to the United States Constitution requires that such inmates, when they reach this as yet undetermined point in their sentence, be given written explanations of adverse decisions by the Board of Pardons?

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved is the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

In February, 1976, David K. Dumschat instituted an action in the District Court for the District of Connecticut claiming, in essence, that he had been deprived of a federally protected right within the purview of 42 U.S.C. 1983 because the Connecticut Board of Pardons had, on a number of occasions, denied him a pardon and on no occasion did the Board provide him with a statement of reasons for this denial. Dumschat's claim is that he is entitled to such a statement under the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

In that action Judge Blumenfeld concluded that ". . . due process attaches to the denial of a pardon to an inmate like Dumschat sentenced to life-imprisonment who has served almost two-thirds of his minimum term." *Dumschat v. Connecticut Board of Pardons*, 432 F.Supp. 1310, 1315n.17 (D.Conn. 1977). In accordance with the Court's opinion, a declaratory judgment was issued ". . . that judgment enter and hereby does enter for the Plaintiff David K. Dumschat and that the Defendant the Connecticut Board of Pardons furnish Plaintiff a written statement of reasons and facts relied upon in denying him a pardon."

The authority to pardon which is involved is the authority of the Connecticut Board of Pardons under Section 18-26, Connecticut General Statutes, to reduce the minimum term of an inmate including, of course, an inmate serving a life term, thereby accelerating the inmate's eligibility for consideration for release to the community by the Connecticut Board of Parole. (See: *Dumschat v. Board of Pardons, State of Connecticut*, 432 F.Supp. 1310, 1312 (D.Conn.1977) and the opinion of the Second Circuit following remand, (App. p. 5a footnote 1.)

The Board of Pardons took an appeal to the United States Court of Appeals for the Second Circuit from that judgment.

On June 16, 1977, Dumschat was given relief by the Board of Pardons. The parties agreed that this relief rendered the appeal moot pursuant to *Weinstein v. Bradford*, 423 U.S. 147, 96 S.Ct. 347, 46 L.Ed.2d 350 (1975); *Holup v. Gates*, 544 F.2d 82 (2d Cir. 1976) cert. denied, 430 U.S. 941, 97 S.Ct. 1571, 51 L.Ed.2d 787 (1977).

By order of the Court dated January 12, 1978, the case was remanded to the District Court.

In December, 1977, James Brown, Stanley Czaja and James Shelton, each of whom are also serving life sentences, filed an action in the District Court making the same claims as Dumschat.

As with Dumschat, these three plaintiffs had been denied a pardon without being given a statement of reasons.

The defendants moved in the District Court to vacate its judgment in *Dumschat* and to dismiss as moot. This motion was denied.

The plaintiffs in both actions in the District Court were represented by the same counsel. The plaintiffs Brown, Czaja and Shelton filed a Motion to Intervene in *Dumschat*, to consolidate their action with *Dumschat* and to have the consolidated action certified as a class action.

All of these motions were granted by Judge Blumenfeld.

An additional evidentiary hearing was held in the District Court at which the parties agreed and the Court approved that the record before the Court in *Dumschat* would be included in the record in the consolidated actions then before the Court as

well as the record in a previous similar action which became moot after trial but before decision, *Carrona v. John R. Manson, et al.* (D. Conn.), Civil No. H-74-377.

Judge Blumenfeld reached the same conclusion that he had reached in his earlier decision in *Dumschat* and, in addition, went beyond that earlier decision and held that:

> "Therefore, because an inmate's liberty interest is seriously affected by the pardon procedure, I need not 'draw the constitutional line' in the present action.[1] In a pardon hearing of an inmate sentenced to life imprisonment, the Due Process Clause protects the inmate's interest in obtaining reasons for denial of pardon irrespective of the time served on his sentence when his pardon application is considered.
>
> "After hearing the testimony of the present Chairman of the Board of Pardons, it appears that the conditions present at the time of my original decision on this matter continue to exist without interruption or change. Therefore, in all respect, I adhere to my prior decision in this matter and rule that the Connecticut Board of Pardons furnish any member of the plaintiff class a written statement of reasons and the facts relied on when he is denied a pardon." (See Appendix, p. 25a); *Dumschat v. Board of Pardons*, 462 F.Supp. 509, 511-12 (D.Conn. 1978).

Two judgments were entered in the District Court, one in *Dumschat* as consolidated with Brown, Czaja and Shelton as intervening plaintiffs (District Court Docket No. H-76-102) and the second in the action brought by Brown, Czaja and Shelton (District Court Docket No. H-77-657).

---

[1]As is noted above, Judge Blumenfeld's previous decision was limited to persons sentenced to a term of life imprisonment who have served ". . . almost two-thirds of [their] minimum term."

Insofar as is pertinent, these judgments provided that "It is therefore accordingly ORDERED and ADJUDGED that Judgment enter and hereby does enter . . . that the Connecticut Board of Pardons furnish any member of the Plaintiff class [inmates currently serving sentences of life imprisonment at the Connecticut Correctional Institution, Somers and the Connecticut Correctional Institution, Enfield] a written statement of reasons and facts relied upon when such member of the Plaintiff class is denied a pardon by the Board." (See Appendix, pp. 26a-27a.)

In a *per curiam* opinion, the judgments were affirmed by the United States Court of Appeals for the Second Circuit. That Court's opinion is contained in the Appendix at p 18a; *Dumschat v. Board of Pardons*, 593 F.2d 165 (2d Cir. 1979).

The Board of Pardons then petitioned this Court for a Writ of Centiorari. This petition was granted by this Court on June 11, 1979 and this Court ordered that "The judgment is vacated and the case is remanded to the United States Court of Appeals for the Second Circuit for further consideration in light of *Greenholtz v. Inmates of Nebraska Penal Complex* [99 S.Ct. 2100 (1979)]."

The Second Circuit requested the parties to file further briefs with that Court taking into consideration this Court's opinion in *Greenholtz*. The parties filed their respective briefs, and on March 20, 1980 the Second Circuit entered the following judgment which is the basis upon which this Petition for a Writ of Certiorari is filed:

> "Upon reconsideration, we affirm our earlier conclusions that (1) the consistent issuance of pardons to inmates serving life sentences in Connecticut has given them a protected 'liberty' interest in the pardons process, and (2) the due process rights which attend this protected interest require that life inmates

receive written explanations of adverse decisions by the Board of Pardons. We remand to the district court to determine at what point in an inmate's incarceration the likelihood of his receiving a pardon becomes sufficiently great to vest him with a protected 'liberty' interest and due process rights." See Appendix pp. 4a-5a.

REASONS FOR GRANTING THE WRIT

1. THE OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDES A FEDERAL QUESTION IN A WAY WHICH IS IN CONFLICT WITH THE APPLICABLE DECISION OF THIS COURT.

Rule 19.1.(b) of the Rules of this Court provides, in part, that one of the factors to be considered in granting certiorari is whether ". . . a court of appeals . . . has decided a federal question in a way in conflict with applicable decisions of this court . . ."

The authority of the Connecticut Board of Pardons, insofar as is relevant to this action, is provided for in Section 18-26, Connecticut General Statutes. This statute provides, in part, that:

> "(a) Jurisdiction over the granting of, and the authority to grant, commutations of punishment or releases, conditioned or absolute, in the case of any person convicted of any offense against the state and commutations from the penalty of death shall be vested in the board of pardons.
>
> (b) Said board shall have authority to grant pardons, conditioned or absolute, for any offense against the state at any time after the imposition and before or after the service of any sentence."

As is noted above, the authority of the Board which is involved here is its authority to reduce the minimum term of the sentence of a person who is confined with the result being that the person's eligibility to be considered for release to the community by the Connecticut Board of Parole is accellerated. (See: *Dumschat v. Board of Pardons*, 432 F.Supp. 1310, 1312 (D.Conn. 1977), and the Opinion of the Second Circuit following remand, App. p. 5a footnote 1.)

The paroling authority in the State of Connecticut is in the Connecticut Board of Parole (See: Section 54-124a, Connecticut General Statutes). The Board of Parole is a separate and distinct agency from the Board of Pardons.

With regard to this paroling authority the Connecticut Supreme Court has held that:

> "The sole statute concerning parole, § 54-125, simply provides that an inmate who has served his minimum sentence 'may be allowed to go at large on parole in the discretion of the panel of the board of parole for the institution in which the person is confined.' There is no statutory requirement that the panel actually consider the eligibility of any inmate for parole, the statute does not vest an inmate with the right to demand parole, and there is no statutory provision which even permits an inmate to apply for parole." *Taylor v. Robinson*, 171 Conn. 691, 697, 372 A.2d 102 (1976).

The interpretation of this statute by "[t]he highest state court is the final authority on state law . . ." *Fidelity Union Trust Co. v. Field*, 61 S.Ct. 176, 178 (1940).

Upon reconsideration following the remand from this Court the Second Circuit correctly concluded that ". . . Connecticut's pardon's statute [Sec. 18-26, Conn. Gen. Stat.] con-

tains neither a presumption of pardon nor a list of factors to be considered by the Board of Pardons. Instead, the statute grants the board *unfettered discretion in the exercise of its power* . . . . The statute offers only a 'mere hope' of pardon; it does not create a legitimate expectation of freedom and therefore does not implicate due process." (See Appendix p. 9a) (Emphasis added).

The Second Circuit went on, however, to affirm the contention of Connecticut's life inmate ". . . that they had a legitimate expectation of pardon and release — and due process rights in pardon proceedings — by virtue of the regularity with which the Board of Pardons grants them relief. Though the statistical evidence provided below by state officials was not, as Judge Blumenfeld noted, 'as extensive as might be desired,' 432 F.Supp. at 1314, it was sufficient to establish that pardons are granted to Connecticut's life inmates with compelling frequency. Bernard Gates, then chairman of the Board of Parole, testified that more than 75 percent of Connecticut's 'lifers' have their eligibility for parole accelerated by the Board of Pardons. Ninety percent of these inmates are then granted parole within their first year of eligibility, and all are paroled after no more than a few years' wait. In addition, the board grants immediate release to a number of other life inmates by commuting their sentences to time served." (See App. pp. 10a-11a.)

In so holding, the Second Circuit clearly concluded that this Court's opinion in *Greenholtz* did not affect the Second Circuit's conclusion before remand that "The vast majority of those in the plaintiff class, a class composed of those serving life sentences, are granted relief by the Board of Pardons prior to the expiration of 20 years, the statutory minimum period (less time for good behavior) that lifers must ordinarily serve before they are eligible for parole. [that] This almost invariable practice creates in the class a liberty interest in the pardons process." (See App. p. 20a); *Dumschat v. Board of Pardons*, 593 F.2d 165, 166 (2d Cir. 1979).

Thus, the Second Circuit concluded that a lifer in Connecticut who has no statutorily based expectation of being released on parole or of even being considered eligible or applying for parole (*Taylor v. Robinson*, supra) and who under its opinion applies for a pardon to a board with "unfettered discretion" nevertheless has a "legitimate expectation of pardon and release" so as to trigger the applicability of due process at least to the extent of requiring the Board of Pardons to provide the life term inmate with "written explanations of adverse decisions" when he has completed some as yet undetermined portion of his sentence.

To have this legitimate expectation based solely upon the Board's history in granting pardons, such as that history appears thus far in the record, not only raises the question of how anyone could arrive at such an expectation in view of the discretion of the Board which considers his case but it is also difficult to understand in view of the Court's stated rationale for requiring such a written statement.

This rationale is that "The need to give reasons encourages fair and thoughtful deliberations by the board, thus protecting against arbitrary and constitutionally impermissable decisions. Moreover, it promotes consistency, an important consideration in light of the board's frequent changes in personnel." [Thirteen different people sat on the five person board between November 1973 and November 1976.] Finally, it helps inmates to correct misunderstandings by the board or to remedy their own behavioral or other problems which influenced the board's denial of relief". (Appendix pp. 14a-15a).

It is respectfully claimed that it is simply inconsistent to say that a lifer, at some point in his sentence, acquires a constitutionally protected legitimate expectation of relief from the Board because of the Board's history in dealing with lifers

and at the same time, justify the constitutional relief given on the grounds that this relief "encourages fair and thoughtful deliberations . . ." and that it "protect[s] against arbitrary and constitutionally impermissable decisions" and that it "promotes consistancy" and that it "corrects misunderstandings".

Putting the Board's statutorily "unfettered discretion" aside, since the Court feels that the administrative process itself is subject to such defects, and in this regard the petitioners do not concede this to be the case, then one has to wonder how a lifer could have any expectation of favorable action from a Board whose history of prior decisions upon which that expectation is promised, has been and presumably will continue to be so influenced by chance.

> "The Due Process Clause applies when government action deprives a person of liberty or property; accordingly, when there is a claimed denial of due process we have inquired into the nature of the individual's claimed interest.
>
> '[T]o determine whether due process requirements apply in the first place, we must look not to the "weight" but to the *nature* of the interest at stake . . .' Board of Regents v. Roth, 408 U.S. 564, 570-571; 92 S.Ct. 2701, 2705-2706, 33 L.Ed. 2d 548 (1974).
>
> This has meant that to obtain a protectible right 'a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.' Id., at 577, 92 S.Ct. at 2709.
>
> "There is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence. The natural desire

> of an individual to be released is indistinguishable from the initial resistance to being confined. But the conviction, with all its procedural safeguards, has extinguished that liberty right: '[G]iven a valid conviction, the criminal defendant has been constitutionally deprived of his liberty.' Meachum v. Fano, 427 U.S. 215, 224, 96 S.Ct. 2532, 2538, 49 L.Ed.2d 451 (1977)." *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, et al.*, 99 S.Ct. 2100, 2103-2104 (1979).

Under the circumstances found by the Second Circuit as noted above, it is impossible to see how a lifer in Connecticut when applying for a pardon can be said to have "a legitimate claim of entitlement to it".

The lifer's expectation of obtaining pardon, which is comparable to that of a prisoner in remaining at a particular institution, is simply ". . . too empheral and insubstantial to trigger procedural due process protections . . .". *Meachum v. Fano*, 427 U.S. 215, 228, 96 S.Ct. 2532, 2540, 49 L.Ed.2d 451 (1976).

Lastly, with regard to this Court's opinion in *Greenholtz*, the Second Circuit held that in basing their conclusion on the Board's history "We find nothing in *Greenholtz* that precludes this holding." (App. p. 12a). In so doing, the Second Circuit rejected the claim of the petitioners that *Greenholtz* does preclude such a holding. (See App. p. 12a footnote 6).

In *Greenholtz*, similar statistics were available to this Court, by virtue of the certified record, for the District Court had included in its decision a table showing numbers of inmates eligible for discretionary parole and the number who obtained it. *Inmates of Nebraska Penal and Correctional Complex v. Greenholtz*, 436 F.Supp. 430 (1976) table at 439.

Simple calculation shows that among Caucasians, Blacks

and Mexicans eligible for discretionary parole approximately sixty percent of each group achieved release. Thus, if local Board practice which resulted in a statistical showing that it was more likely than not, that one would achieve discretionary parole were a sufficient basis for a protected liberty interest then this Court would have so found in *Greenholtz*.

Instead, this Court found "That the State holds out the *possibility* of parole provides no more than a mere hope that the benefit will be obtained". *Greenholtz*, supra, at 2105. (Court's emphasis).

That Connecticut may grant a slightly higher percentage of reduced terms to lifers through its pardons process than Nebraska does discretionary paroles through its parole process is not constitutionally significant. There is no basis upon which to draw a constitutional line at seventy-five percent.

In any event, as "Judge Henry Friendly cogently noted . . .;' [T]here is a human difference between losing what one has and not getting what one wants.' Friendly, Some Kind of Hearing, 123 U.Pa.L.Rev. 1267, 1296 (1974)." *Greenholtz*, supra, 2105.

The life inmate in Connecticut who is denied a reduction in his minimum term is not in the situation of losing what he has but rather in the situation of not getting what he wants.

2. THE OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT IS ALSO IN CONFLICT WITH THIS COURT'S OPINION IN *SCHICK V. REED*.

This conclusion of the Second Circuit of a "liberty interest" is contrary to the opinion of this Court in *Schick v. Reed*, 419 U.S. 256, 95 S.Ct. 379, 42 L.Ed.2d 430 (1974).

In *Schick* this Court dealt with the authority of the President to ". . . have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment." Article 2, Section 2, Clause 1, United States Constitution.

In *Schick* this Court characterized one who seeks a pardon as a ". . . person who *petitions for mercy* . . ." *Schick*, supra, 419 U.S. 267, 95 S.Ct. 385 (emphasis added).

In *Schick*, this Court considered the origins of the President's pardoning power and observed the following:

> "At the time of the drafting and adoption of our Constitution it was considered elementary that the prerogative of the English crown could be exercised upon conditions:
>
> 'It seems agreed, That the king may extend his mercy on what terms he pleases, and consequently may annex to his pardon any condition that he thinks fit, whether precedent or subsequent, on the performance whereof the validity of the pardon will depend.' 2 W. Hawkins, Pleas of the Crown 557 (6th ed. 1787)." *Schick*, supra, 419 U.S. 261, 95 S.Ct. 382.

This Court then went on to hold that:

> "The history of our executive pardoning power reveals a consistent pattern of adherence to the English common law practice." *Schick*, supra, 419 U.S. 262, 95 S.Ct. 383.

This Court further held that "The plain purpose of the broad power conferred by Section 2, cl. 1, was to allow *plenary* authority in the President to '*forgive*' the convicted person in part or entirely, to reduce a penalty in terms of a specified

number of years, or to alter it with *conditions which are in themselves constitutionally unobjectionable.*" *Schick*, supra, 419 U.S. 266, 95 S.Ct. 385. (Emphasis added).

Thus, since the pardoning power is "plenary" subject only to the attachment of conditions which are constitutionally unobjectionable then the denial of a pardon must be "plenary" subject only to the condition that a denial may not be based upon constitutionally impermissable reasons. There is no claim in this case that the denial was based upon constitutionally impermissable reasons.

If the Connecticut Board of Pardons were required to state reasons for denying relief, then it would seem inescapable that the President of the United States in denying pardon relief would similarly be required to state his reasons. Such a conclusion seems ridiculous on its face.

So long as the Board does not deny a pardon for a constitutionally impermissable reason there is no statement which it could give which would serve any purpose. It is impossible to conceive of a situation wherein any court absent the denial of a pardon because of the applicant's race, religion, etc. would overrule a Pardon Board decision to deny clemency.

3. THE QUESTION OF TO WHAT EXTENT, IF ANY, DUE PROCESS APPLIES TO PARDON PROCEEDINGS IS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT.

Rule 19.1(b) of this Court further provides, in part, that one of the factors to be considered in granting Certiorari is whether ". . . a Court of Appeals has . . . decided an important question of Federal Law which has not been, but should be, settled by this Court . . ."

In premising their conclusions upon the history of the Connecticut Board of Pardons in granting relief to lifers the Second Circuit has "decided an important question of Federal Law which has not been, but should be, settled by this Court."

If one regards the pardoning process as a socially useful instrument, then it is difficult to understand the burdening of this process only because of its liberal use.

Certainly the rationale of the Second Circuit would serve as authority for *not* requiring a written explanation for the denial of a pardon in a state where prior history showed an infrequent use of this authority.

If, in fact, the applicability of the due process clause may differ from state to state depending upon the attitudes, philosophies, and personalities of the individual pardoning authorities, then that situation should be the result of a decision from this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this case presents (1) an opinion of a United States Court of Appeals deciding a federal question in a way which is in conflict with the applicable decision of this Court and (2) which involves an important question of federal law which has not been but should be settled by this Court.

The Petitioners respectfully request that a Writ of Certiorari be issued to review the judgment and the opinion of the United States Court of Appeals for the Second Circuit.

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Counsel for Petitioners

CERTIFICATION

This is to certify that on this day of June, 1980, two copies of this Petition for Writ of Certiorari and Appendix thereto were mailed, postage prepaid, to Stephen Wizner, 127 Wall Street, New Haven, Connecticut, counsel for the Respondents.

STEPHEN J. O'NEILL
Assistant Attorney General

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. _____

CONNECTICUT BOARD OF PARDONS, ET AL
Petitioners

v.

DAVID DUMSCHAT
Respondent

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Intervening Respondents

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PETITION FOR A WRIT OF CERTIORARI
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FOR THE SECOND CIRCUIT

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 481, 482—September Term, 1979.

(Submitted November 16, 1979

Decided March 20, 1980.)

Docket Nos. 78-2124, 78-2125

DAVID DUMSCHAT,

Plaintiff-Appellee,

JAMES BROWN, STANLEY CZAJA and JAMES SHELTON,

Intervening Plaintiff-Appellees,

—v.—

BOARD OF PARDONS, State of Connecticut; and RICHARD K. LUBLIN (Chairman), ALVIN DOZEMAN, PAUL J. MCQUILLAN, JOHN P. COTTER, and MICHAEL E. DUBISSETTE, Members of the Board of Pardons,

Defendants-Appellants.

JAMES BROWN, STANLEY CZAJA and JAMES SHELTON,

Plaintiffs-Appellees,

—v.—

BOARD OF PARDONS, State of Connecticut, and PAUL J. MCQUILLAN (Chairman), ALVIN DOZEMAN, MICHAEL E. DUBISSETTE, JOHN SPEZIALE and PHILIP TATOIAN, Members of the Board of Pardons,

Defendants-Appellants.

Before:

KAUFMAN, *Chief Judge,*
SMITH* and OAKES, *Circuit Judges.*

On remand from the Supreme Court vacating the judgment of this court, 593 F.2d 165 (2d Cir. 1979).

We affirm our earlier decision and remand to the district court for further proceedings consistent with this opinion.

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* Pursuant to §0.14 of the Rules of this Court, this appeal is being determined by Chief Judge Kaufman and Judge Oakes. Judge Smith read the briefs in this case and voted before his death on February 16, 1980, to dispose of the case in the manner set forth in this opinion. He was unable to concur in the written opinion since it was drafted after his death.

CARL R. AJELLO, Attorney General of the State of Connecticut, Hartford, Connecticut (Stephen J. O'Neill, Assistant Attorney General, of counsel), *for Defendants-Appellants.*

STEPHEN WIZNER, Yale Legal Services, New Haven, Connecticut (Dennis E. Curtis, Alice Bussiere and Judith Resnik, of counsel), *for Plaintiffs-Appellees.*

PER CURIAM:

This case returns to us on remand from the United States Supreme Court. In our previous decision we affirmed, *per curiam*, the judgment of the United States District Court for the District of Connecticut, M. Joseph Blumenfeld, *Judge*, that inmates serving life sentences in Connecticut prisons have a due process right to written statements from the state Board of Pardons explaining the denial of their applications for pardon. *See* 593 F.2d 165 (2d Cir. 1979). The Supreme Court vacated our judgment, 99 S.Ct. 2854 (1979), and remanded for reconsideration in light of *Greenholtz* v. *Inmates of Nebraska Penal and Correctional Complex*, 99 S.Ct. 2100 (1979).

Upon reconsideration, we affirm our earlier conclusions that (1) the consistent issuance of pardons to inmates serving life sentences in Connecticut has given them a protected "liberty" interest in the pardons process, and (2) the due process rights which attend this protected interest require that life inmates receive written explanations of adverse decisions by the Board of Pardons. We remand to the district court to deter-

mine at what point in an inmate's incarceration the likelihood of his receiving a pardon becomes sufficiently great to vest him with a protected "liberty" interest and due process rights.

I.

This action was commenced by plaintiff David Dumschat in February 1976. Dumschat was serving a life sentence following a 1964 homicide conviction, and, under state law, he was not eligible for parole until December 1983. Dumschat had appeared several times before the Connecticut Board of Pardons, which is empowered by statute to grant a life inmate his immediate release or to accelerate his eligibility for parole. Conn. Gen. Stat. Ann. § 18-26.[1] On each occasion, the board rejected Dumschat's application without written or oral explanation.

After rehearing testimony from officials of the pardon and parole boards, Judge Blumenfeld concluded that Dumschat had a protected liberty interest in the pardons process. *See* 432 F. Supp. 1310 (D. Conn. 1977). Accordingly, he issued a declaratory judgment holding that the Board of Parole violated Dumschat's

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1 The board is authorized to grant pardons "conditioned or absolute." Its members testified below that the board has never to their knowledge granted an inmate an absolute pardon, *i.e.*, a pardon releasing him unconditionally and absolving him of guilt in the crime for which he was imprisoned. (Such slate-cleaning pardons are occasionally issued to former inmates.) The board occasionally pardons an inmate on time served. Such a commutation of sentence gives the inmate immediate, unconditional freedom but does not erase the underlying conviction. Favorable action by the board usually takes the form of a reduction in the inmate's minimum term. This type of "pardon" simply hastens the inmate's eligibility for parole; his release requires a favorable ruling by the Board of Parole.

due process rights when it failed to provide a written statement of reasons explaining its action.

On the very date that Judge Blumenfeld issued his decision, June 16, 1977, the Board of Pardons commuted Dumschat's sentence to time served, thereby granting him his immediate release. Nevertheless, Judge Blumenfeld denied the defendants' motion to vacate his judgment as moot.[2] Instead, he allowed three other life inmates to intervene and to consolidate their pending suit against the Board of Pardons with Dumschat's. The judge also granted the intervenors' motion to certify the consolidated suit as a class action, brought on behalf of all inmates serving life sentences in Connecticut state prisons. After a new round of hearings, Judge Blumenfeld expanded his original decision to encompass the new plaintiff class. The Board of Pardons, he ruled, must furnish a written statement of reasons whenever a life inmate is denied a pardon. 462 F. Supp. 509 (D. Conn. 1978). This court affirmed his decision in a *per curiam* opinion. Our affirmance was then vacated by the Supreme Court and remanded with instructions to reconsider in light of the Court's recent decision in *Greenholtz* v. *Inmates of Nebraska Penal and Correctional Complex*, *supra*.

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2 The defendants appealed the original *Dumschat* decision to this court, then moved for us to vacate the district court judgment as moot and remand to Judge Blumenfeld with instructions to dismiss the complaint. We chose simply to remand without further comment or instructions.

II.

In *Greenholtz*, the Supreme Court held that Nebraska state inmates were not constitutionally entitled to formal hearings before the Nebraska Board of Parole or to detailed written explanations of adverse parole decisions. The Court declared, first, that a state does not create a constitutionally cognizable liberty interest in parole release simply by establishing the possibility of parole. The "mere hope" of future freedom, without more, was deemed insufficient to invoke due process. *See* 99 S.Ct. at 2103-05. Analogizing to the standards for determining the existence of a protected property interest, as articulated in *Board of Regents* v. *Roth*, 408 U.S. 564, 576-78 (1972), the Court indicated that the existence of a protected liberty interest in parole depends on whether inmates enjoy a "legitimate expectation" of parole release. 99 S.Ct. at 2103-05. The Court found that such an expectation was generated by Nebraska's statutory parole scheme and that "the expectancy of release provided in this statute is entitled to some measure of constitutional protection." *Id.* at 2105-06. The Court held, however, that this protection did not extend so far as to mandate formal hearings before the parole board or detailed explanations of parole rejections. *Id.* at 2106-08.

III.

Our first task is to consider, in the wake of *Greenholtz*, whether Connecticut's life inmates have a protected interest in the pardons process. In *Boothe* v. *Hammock*, 605 F.2d 661 (2d Cir. 1979), this court embraced the Supreme Court's declaration in

Greenholtz that the establishment of a parole system does not in itself give rise to due process rights in parole procedures. Similarly, in *Pugliese* v. *Nelson*, Nos. 79-2136, 2138, 2140 (2d Cir. Mar. 4, 1980), we acknowledged that *Greenholtz* required us to overrule our decision in *Cardaropoli* v. *Norton*, 523 F.2d 990 (2d Cir. 1975), which held that simply the threat of "grievous loss" was sufficient to trigger due process protection. Thus, we held that no liberty interest was implicated in a classification scheme that hindered an inmate's ability to participate in social furlough, work release, and halfway house programs.

An inmate's stake in the pardons process is essentially the same as his stake in parole, furlough, or work release: early release from incarceration. A state no more creates a protected interest by holding out the possibility of pardon, absolute or conditional, than it does by offering the possibility of parole or furlough. To prevail, therefore, Connecticut's life inmates must show more than a "mere hope" or subjective anticipation of pardon; they must, instead, show an expectation with some concrete, objective basis. *See Greenholtz*, *supra*, 99 S.Ct. at 2103-05; *Board of Regents* v. *Roth*, *supra*, 408 U.S. at 576-78. As we stated in *Pugliese*, *supra*, slip op. at 1605, to "qualify as constitutionally protected 'liberty', the prisoner's interest must be . . . one that he would normally expect to have as a matter of custom and practice."

In *Greenholtz*, the Supreme Court found that a constitutionally significant expectation of parole was created by the language of the Nebraska parole statute. It provided that the parole board "shall order" an inmate's release when he becomes eligible for parole in the absence of specific disqualifying conditions. *See*

Neb. Rev. Stat § 88-1,114(1).[3] In marked contrast, Connecticut's pardons statute contains neither a presumption in favor of pardon nor a list of factors to be considered by the Board of Pardons. Instead, the statute grants the board unfettered discretion in the exercise of its power. *See* Conn. Gen. Stat. Ann. § 18-26.[4] The statute offers only the "mere hope" of pardon; it does not create a legitimate expectation of freedom and therefore does not implicate due process. *See Pug-*

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3 The statute provides in pertinent part:

> Whenever the Board of Parole considers the release of a committed offender who is eligible for release on parole, it shall order his release unless it is of the opinion that his release should be deferred because:
>
> (a) There is a substantial risk that he will not conform to the conditions of parole;
>
> (b) His release would depreciate the seriousness of his crime or promote disrespect for law;
>
> (c) His release would have a substantially adverse effect on institutional discipline; or
>
> (d) His continued correctional treatment, medical care, or vocational or other training in the facility will substantially enhance his capacity to lead a law-abiding life when released at a later date.

It was apparently the presumptive "shall order . . . unless" construction of the Nebraska statute which led the Supreme Court to conclude that its "unique structure and language" gave rise to due process rights in parole proceedings. *Greenholtz* v. *Inmates of the Nebraska Penal and Correctional Complex*, 99 S.Ct. 2100, 2106 (1979). *See Boothe* v. *Hammock*, *supra*, 605 F.2d at 664.

4 The statute provides in pertinent part:

> (a) Jurisdiction over the granting of, and the authority to grant, commutations of punishment or releases, conditioned or absolute, in the case of any person convicted of any offense against the state and commutations from the penalty of death shall be vested in the board of pardons.
>
> (b) Said board shall have authority to grant pardons, conditioned or absolute, for any offense against the state at any time after the imposition and before or after the service of any sentence.

liese, *supra*, slip op. at 1608; *Boothe*, *supra*, 605 F.2d at 664; *Wagner v. Gilligan*, No. 77-3372 (6th Cir. 1979). *Compare Wolff* v. *McDonnell*, 418 U.S. 539 (1974) (inmates had protected liberty interest in "good-time" credits where statute provided that such credits were to be forfeited only for serious misbehavior).

Statutory or constitutional language, however, is not the only ground upon which a legitimate expectation of liberty or property may rest. Such an expectation, with attendant due process rights, may also be based on regulations, policies, understandings, contractual arrangements or institutional practices. *See Perry* v. *Sindermann*, 408 U.S. 593, 601-03 (1972); *Board of Regents* v. *Roth*, *supra*, 408 U.S. at 577-78; *Morrissey* v. *Brewer*, 408 U.S. 471, 480-82 (1972). As we emphasized in *Pugliese*, *supra*, slip op. at 1605:

> Considerable weight is given to whether the alleged liberty interest is in the nature of a "bird in the hand" rather than one in the bush. A protected liberty interest is created, for example, where the inmate currently enjoys or may reasonably expect to enjoy an important and substantial benefit upon his compliance with or the occurrence of certain conditions, which may be withdrawn only for good cause.

Connecticut's life inmates contend that they have a legitimate expectation of pardon and release—and due process rights in pardon proceedings—by virtue of the regularity with which the Board of Pardons grants them relief. Though the statistical evidence provided below by state officials was not, as Judge Blumenfeld noted, "as extensive as might be desired," 432 F. Supp. at 1314, it was sufficient to establish that pardons are

granted to Connecticut's life inmates with compelling frequency. Bernard Gates, then chairman of the Board of Parole, testified that more than 75 percent of Connecticut's "lifers" have their eligibility for parole accelerated by the Board of Pardons. Ninety percent of these inmates are then granted parole within their first year of eligibility, and all are paroled after no more than a few years' wait. In addition, the board grants immediate release to a number of other life inmates by commuting their sentences to time served.[5]

After reviewing these statistics, Judge Blumenfeld concluded that "the long-term inmate's expectation of pardon is a justifiable one rooted in state practice [and] implicates a liberty interest requiring due process protections." 432 F. Supp. at 1314. We affirmed this conclusion on appeal, holding that "[t]his almost invariable practice creates . . . a liberty interest in the pardons process," 593 F.2d at 166, and we reaffirm it now. The overwhelming likelihood that Connecticut life inmates will be pardoned and released before they complete their minimum terms gives them a constitutionally protected liberty interest in pardon proceedings. *See Perry* v. *Sindermann*, *supra*, 408 U.S. at 602-03 (state university professor had protected interest in continued employment if he could show that "the policies and practices of the institution" created an unwritten "common law" of tenure); *Phillips* v. *Bureau of Prisons*, 591 F.2d 966, 971 (D.C. Cir. 1979) ("consistent, positive action of government officials" allowing paralegals to

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5 *See* note 1 *supra*. Gates also testified that "no more than 10 or 15 percent" of Connecticut's life inmates serve their minimum terms. This may mean that the Board of Pardons grants relief to 85 or 90 percent of the inmates; on the other hand, the figure may include those who have died in prison or who for some other reason served less than their minimum terms without the board's assistance.

visit prisoners gave paralegals a protected interest in such visits); *Stretton* v. *Wadsworth Veterans Hospital*, 537 F.2d 361, 367 (9th Cir. 1976) ("we believe *Roth* recognized that rehire rates under some circumstances may evidence a 'common law' of employment to support the finding of a property interest"); *Schwartz* v. *Thompson*, 497 F.2d 430, 433 (2d Cir. 1974) ("[n]or is there any suggestion that the vast majority of staff attorneys are promoted to supervisory positions so as to create *de facto* 'right' to such advancement"). We find nothing in *Greenholtz* that precludes this holding.[6] Indeed, our opinion in *Pugliese* appears to contemplate this precise result. See slip op. at 1612.

A finding that life inmates have a legitimate expectation of pardon and release prior to the expiration of their minimum terms does not mean, however, that they have a legitimate expectation of pardon after a year in prison, or two years, or ten. Connecticut's life inmates may apply for relief from the Board of Pardons after serving a year in prison and may apply annually thereafter. To determine how many years an inmate must serve before his application is entitled to due process protection, it is necessary to determine at

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6 The defendants-appellants point out that the Supreme Court in *Greenholtz* had before it figures showing that the Nebraska parole board awarded discretionary parole to nearly 60 percent of eligible inmates. If statistical probability were enough to create a protected interest in prison release, they assert the Supreme Court would have so found in *Greenholtz*. The Court's failure to do so, they submit, means that probability alone is insufficient to invoke due process. This argument must be rejected. *Greenholtz* held that Nebraska inmates had a protected interest in parole proceedings because of statutory language. The Court, therefore, did not consider whether Nebraska's historical pattern of parole might also give rise to due process rights. The Court's silence on this issue—an issue which it had no need to reach and which had not been raised by the parties—is of no significance in this case.

what point inmates are vested with a protected interest in the pardons process, *i.e.*, when the probability that they will receive pardon and release becomes constitutionally significant.

Judge Blumenfeld twice explicitly declined to reach this question. In his first opinion, he saw no need to fix a precise point at which due process was implicated because the suit involved a single plaintiff, Dumschat, who had already served more than two-thirds of his minimum sentence and who, therefore, clearly had a legitimate expectation of pardon based on state practice.[7] In his second opinion, the district court judge again found it unnecessary to reach the question because he held the mere possibility of pardon generated due process rights. This conclusion, of course, is no longer tenable in light of *Greenholtz*, *Boothe*, and *Pugliese*. We therefore remand to the district court to determine how many years life inmates must serve before the probability of pardon becomes so significant as to give rise to a protected liberty interest. Only after this period has elapsed are lifers entitled to due process safeguards in the pardons process.

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7 Judge Blumenfeld remarked in a footnote that "it is not clear at exactly what point in their incarceration lifers generally receive a pardon." 432 F. Supp. at 1314 n.12. He then noted Bernard Gates's testimony that "I can't speak of it recently, but the bulk of commutations [for life inmates] over past years appeared to come between 14 and 17 years" of imprisonment. This was the only testimony below concerning the timing of pardons. Accordingly, we remand to Judge Blumenfeld who can obtain additional information on this question.

IV.

We turn, finally, to consider what procedural protection is due those life inmates in whom a liberty interest has vested. Specifically, we review, in light of *Greenholtz*, the district court's decision that a life inmate's due process rights require the Board of Pardons to provide a written explanation when it rejects his application for relief.[8]

Due process is a highly flexible doctrine. To determine what process is due in a particular case, a court must consider "the need for and usefulness of the particular safeguard in the given circumstances," Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267, 1278 (1975), and its effect on governmental and private interests. *See, e.g., Greenholtz, supra*, 99 S.Ct. at 2106-08; *Mathews* v. *Eldridge*, 424 U.S. 319, 333-49 (1976); *Wolff* v. *McDonnell, supra*, 418 U.S. at 560-72; *Morrissey* v. *Brewer, supra*, 408 U.S. at 483-89. As we held in our previous opinion in this case, the record amply supports Judge Blumenfeld's conclusion that a mandatory statement of reasons has a number of salutary consequences. The need to give reasons encourages fair and thoughful deliberations by the board, thus protecting against arbitrary and constitutionally impermissible decisions. Moreover, it promotes consistency, an important consideration in light of the board's frequent changes in personnel.[9] Finally, it helps inmates to cor-

8 In his complaint, Dumschat sought not only a statement of reasons from the board but also access to all information available to the board in its consideration of his applications. This additional relief was not granted by Judge Blumenfeld. The claim to access was dropped in the consolidated suit and class action and is no longer at issue.

9 Thirteen different people sat on the five-person board between November 1973 and November 1976.

rect misunderstandings by the board or to remedy their own behavioral or other problems which influenced the board's denial of relief.[10]

The record also supports Judge Blumenfeld's finding that a reasons requirement does not unduly burden the Board of Pardons. Indeed, the requirement involves only a small number of applicants before the board.[11] Further, the statements provided by the board need not be lengthy or detailed—the board should be able to summarize the grounds for its decision sufficiently in a sentence or two. Board chairman Paul McQuillan himself testified below that the reasons requirement would be workable and would present no great administrative difficulty.

Nothing in *Greenholtz* requires us to overrule Judge Blumenfeld's determination regarding the requirements of due process in this case. In fact, dicta in *Greenholtz* suggests support for Judge Blumenfeld's conclusion. The *Greenholtz* plaintiffs already were entitled to brief statements of reasons from the Nebraska parole board. They contended that due process required more detailed statements outlining the evidence relied on by the board in reaching its decision. The Supreme Court held that a brief statement of reasons was sufficient under the due process clause, further suggesting that a brief statement was not only constitutionally sufficient but also constitutionally *necessary*:

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10 On the benefits of a reasons requirement as a due process safeguard, *see generally*, *Wolff* v. *McDonnell*, 418 U.S. 539, 564-65 (1974); *Haymes* v. *Regan*, 525 F.2d 540, 543-44 (2d Cir. 1975).

11 Thirty-five inmates were serving life sentences in Connecticut prisons as of November 1977. Moreover, only those who have served long enough to have a protected interest in pardon—a length of time to be determined by the district court on remand—have a right to statements of reasons from the board.

> [W]hen parole is denied [the board] informs the inmate in what respects he falls short of qualifying for parole; *this affords the process that is due under these circumstances.*

99 S.Ct. at 2108 (emphasis added).

We hold that Connecticut life inmates who have a protected interest in the pardon process are entitled to the procedural safeguard which the Supreme Court considered "due" in *Greenholtz* — short statements of reasons explaining why they have been denied relief. We remand to the district court to determine at what point in their incarceration life inmates acquire a protected liberty interest in pardons.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

June 11, 1979

Stephen J. O'Neill
Assistant Attorney General
340 Capitol Avenue
Hartford, CT 06115

RE: Connecticut Board of Pardons, et al.
v. David Dumschat, et al.
No. 78-1533

Dear

The Court today entered the following order in the above-entitled case:

The motion of respondents for leave to proceed in forma pauperis is granted. The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Second Circuit for further consideration in light of Greenholtz v. Inmates of Nebraska Penal Complex, 442 U.S. (1979).

Very truly yours,

MICHAEL RODAK, JR., Clerk

RECEIVED
1979
ATTORNEY GENERAL'S OFFICE
340 CAPITOL AVE., HTFD

Michael Rodak, Jr.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 539, 540 — August Term, 1978.

(Argued January 9, 1979 Decided January 11, 1979.)

Docket Nos. 78-2124-25

DAVID DUMSCHAT,

Plaintiff-Appellee,

JAMES BROWN, STANLEY CZAJA and JAMES SHELTON,

Intervening Plaintiffs-Appellees,

v.

BOARD OF PARDONS, State of Connecticut; and RICHARD K. LUBLIN (Chairman), ALVIN DOZEMAN, PAUL J. DUBISSETTE, Members of the Board of Pardons,

Defendants-Appellants.

JAMES BROWN, STANLEY CZAJA and JAMES SHELTON,

Plaintiffs-Appellees,

v.

BOARD OF PARDONS, State of Connecticut; and PAUL J. MCQUILLAN (Chairman), ALVIN DOZEMAN, MICHAEL E. DUBISSETTE, JOHN SPEZIALE, and PHILIP TATOIAN, Members of the Board of Pardons,

Defendants-Appellants.

B e f o r e:

KAUFMAN,

Chief Judge,

SMITH and OAKES,

Circuit Judges.

Appeal from declaratory judgment entered in the United States District Court for the District of Connecticut.

M. Joseph Blumenfeld, *Judge*, requiring statement of reasons by Connecticut Board of Pardons in case of denial of application for pardon by prisoners serving life terms. Affirmed.

STEPHEN J. O'NEILL, Assistant Attorney General (Carl R. Ajello, Attorney General of the State of Connecticut, of counsel), *for Appellants*.

STEPHEN WIZNER, New Haven, Conn. (Yale Legal Clinic, Dennis E. Curtis, Mary F. Keller, Alice Bussiere, Judith Resnik, of Counsel), *for Appellees*.

PER CURIAM:

On this appeal from a declaratory judgment of the United States District Court for the District of Connecticut in a class action requiring a statement of reasons by the Connecticut Board of Pardons in case of denial of application for pardon by prisoners serving life terms, we affirm essentially for the reasons given by Judge Blumenfeld in his opinions below, 432 F. Supp. 1310 (D. Conn. 1977), —— F. Supp. —— (Aug. 18, 1978).

Although pardons at first glance might appear to be different from parole decisions, the Connecticut statutory authority given to the Board of Pardons and its integral part in parole decisions make the two processes similar. The argument by appellants that pardons are solely discretionary decisions of mercy, relying on *Schick* v. *Reed*, 419 U.S. 256 (1974), is not well taken since *Schick* is based on the constitutional authority of the federal executive rather than on the processes of a statutory state board essentially determining the date of eligibility for consideration by another (parole) board.

Written statements of reasons for denial are part of the due process requirements surrounding parole decisions. *Coralluzzo* v. *New York State Parole Board*, 566 F. 2d 375 (2d Cir. 1977), *cert. dismissed*, 435 U.S. 912 (1978); *Zurak* v. *Regan*, 550 F. 2d 86 (2d Cir.), *cert. denied*, 433 U.S. 914 (1977); and *Haymes* v. *Regan*, 525 F. 2d 540 (2d Cir. 1975). These cases are based on the expectations of inmates in regard to parole possibilities which lead to those inmates' acquiring some "liberty interest" in the parole process.

The facts are not seriously in dispute. The vast majority of those in the plaintiff class, a class composed of those serving life sentences, are granted relief by the Board of Pardons prior to the expiration of 20 years, the statutory minimum period (less time for good behavior) that lifers must ordinarily serve before they are eligible for parole. This almost invariable practice creates in the class a liberty interest in the pardons process. As thoughtfully explained in Judge Blumenfeld's opinions, the due process balancing in regard to decisions of the Board of Pardons is similar to that involving a parole board, and thus due process in the proceedings of the Board of Pardons in cases of inmates serving life sentences also requires written statements setting forth reasons for denial. Such statements would provide protection against arbitrary and constitutionally impermissible decisions by the Board by forcing the Board to articulate its reasons for denial. The Board would be encouraged to give more thoughtful consideration to each application. A statement of reasons for denial would aid an inmate in correcting any behavior which was considered negative by making him aware of such behavior. Finally, such statements would help the shifting membership of the Board to be more consistent in its decisions and would create no undue administrative burden.

The judgment of the district court is affirmed.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

DAVID K. DUMSCHAT, ET AL

v.

BOARD OF PARDONS OF THE
STATE OF CONNECTICUT, ET AL

CIVIL NO. H-76-102

MEMORANDUM OF DECISION

Background

This is a class action by the plaintiffs on behalf of themselves and all other inmates of the State of Connecticut who are currently serving sentences of life imprisonment at the Connecticut Correctional Institutions at Somers and at Enfield and who have been, or who will be, denied pardons during their current terms of incarceration by the defendant Connecticut Board of Pardons. The plaintiffs seek a declaratory judgment that the Due Process Clause of the fourteenth amendment to the United States Constitution entitles them to a written statement of reasons when they are denied pardons.

Plaintiff David Dumschat commenced the instant action in February 1976. At that time he was serving a sentence of life imprisonment at the Connecticut Correctional Institution at Enfield following a homicide conviction in 1964. Prior to February 1976, Mr. Dumschat had appeared before the Board of Pardons several times and had never been told why he had been denied a pardon.

On November 18, 1976, this court held an evidentiary hearing at which J. Bernard Gates, Chairman of the Connecticut Board of Parole, and Richard Lublin, then Chairman of the Board of Pardons, testified. Following addi-

tional submissions of written evidence by the defendants, on June 16, 1977, the court issued a declaratory judgment that Mr. Dumschat was entitled to a written statement of reasons when the board denied him a pardon. *Dumschat v. Board of Pardons*, 432 F. Supp 1310 (D. Conn. 1977). The defendants appealed the decision to the United States Court of Appeals for the Second Circuit. However, on June 16, 1977, Mr. Dumschat received a pardon. The defendants, therefore, did not pursue their appeal, but instead filed a motion with the Court of Appeals on August 16, 1977, requesting that the judgment of the District Court be vacated and that the case be remanded. On August 29, 1977, the defendants also filed a motion with this court to vacate the judgment and dismiss the complaint, and on September 13, 1977, the plaintiff consented to having the suit remanded to this court.

On December 20, 1977, while the two motions were pending, the plaintiff-intervenors, James Brown, Stanley Czaja, and James Shelton, filed a separate action claiming that their constitutional rights had been denied when the Board of Pardons denied them pardons without giving them statements of reasons. The three men were then, and are now, inmates at the Connecticut Correctional Institution at Enfield serving sentences of life imprisonment as a result of homicide convictions. Under the present sentences, Mr. Brown, Mr. Czaja, and Mr. Shelton will not be eligible for parole until 1987, 1982 and 1988 respectively. Conn. Gen. Stat. § 54-125, as amended P.A. 76-336 §7 (June 9, 1976). Each of them has been denied a pardon by the Board of Pardons at least twice, with the latest denials for Mr. Brown and Mr. Shelton being in October 1977, and the latest denial for Mr. Czaja being in May 1977. At no time have any of the plaintiff-intervenors been told by any of the defendants why their applications for pardons have been denied.

In January 1978, the Court of Appeals remanded the *Dumschat* suit without further instructions. Following this

court's denial of the defendants' motion to vacate the judgment and dismiss the complaint, the plaintiff-intervenors filed motions to intervene in *Dumschat*, to consolidate their action with *Dumschat*, and to have the consolidated suit certified as a class action. On March 9, 1978, an additional hearing was held at which the present Chairman of the Board of Pardons, Paul J. McQuillan, testified. After that hearing, the plaintiff-intervenors' motion to intervene, motion to have their cases consolidated with *Dumschat*, and motion for certification as a class action were granted.

Discussion

In a previous round on the issue of whether the constitution required the Board of Pardons to give a written statement of reasons to an inmate when he was denied a pardon, this court ruled that a written statement of reasons for the board's decision, including the facts upon which it relied, was constitutionally mandated. See *Dumschat v. Board of Pardons, supra*. That holding was based upon a determination that in view of the evidence that 75 percent of the inmates sentenced to long minimum terms who have served a substantial portion of that sentence do eventually receive some form of pardon from the board, the particular plaintiff acquired a justifiable expectation of pardon and a liberty interest sufficient to invoke the protection of the fourteenth amendment. In that case, I stated:

> "I need not decide on the facts of this case at what point in his incarceration an inmate acquires a justifiable expectation of pardon and a liberty interest sufficient to invoke the protection of the fourteenth amendment. I conclude only that due process attaches to the denial of a pardon to an inmate like Drumschat sentenced to life imprisonment who has served almost two-thirds of his minimum term."

Id., 432 F. Supp. at 1315 n.17.

The present case is certified as a class action for all inmates currently serving sentences of life imprisonment in Connecticut state facilities at Somers and Enfield. Therefore, the question whether an inmate must have served a certain portion of his minimum term before he "acquires a justifiable expectation of pardon and a liberty interest sufficient to invoke the protection of the fourteenth amendment," must now be considered.

In *Coralluzzo v. New York State Parole Board*, 566 F.2d 375 (2d Cir. 1977), *cert. dismissed as improvidently granted*, 46 U.S.L.W. 3553 (March 7, 1978), the Second Circuit decided the question whether the New York minimum period of imprisonment (MPI) procedure is subject to the Due Process Caluse of the fourteenth amendment. In holding that due process rights were implicated in the MPI proceeding, the Second Circuit ruled that the parole board must provide a written statement of reasons, including facts relied upon by the board, when it sets a MPI that exceeds the statutory minimum.

In *Coralluzzo* the state attempted to distinguish the MPI proceeding from various parole release situations where the court had conferred due process protection, see *United States ex rel. Johnson v. Chairman of New York State Board of Parole*, 500 F.2d 925 (2d Cir.), *vacated as moot*, 419 U.S. 1015 (1974); *Zurak v. Regan*, 550 F.2d 86 (2d Cir.), *cert. denied*, 433 U.S. 914 (1977). The state argued that because the prisoner has no reason to expect "imminent liberty," the MPI procedure implicates only a "very tenuous" liberty interest. The Court of Appeals said:

> "[W]e find no indication either in *Johnson* or in the Supreme Court's recent decisions dealing with liberty interests of prisoners, see *Meachum v. Fano*, 427 U.S. 215, 224-25 (1976); *Wolff v. McDonnell*, 418 U.S. 539, 555-58 (1974); *Morrissey v. Brewer*, 408 U.S. 471, 480-82 (1972), that a substantial possibility of im-

> mediate release is the sine qua non of a cognizable liberty interest. To draw the constitutional line where the statistics show it to be more likely than not that the particular proceeding will result in immediate release could risk insulating from due process protection those stages of the parole release process which as a practical matter most seriously affect a prisoner's liberty interest."

Therefore, because an inmate's liberty interest is seriously affected by the pardon procedure, I need not "draw the constitutional line" in the present action. In a pardon hearing of an inmate sentenced to life imprisonment, the Due Process Clause protects the inmate's interest in obtaining reasons for denial of pardon irrespective of the time served on his sentence when his pardon application is considered.

After hearing the testimony of the present Chairman of the Board of Pardons, it appears that the conditions present at the time of my original decision on this matter continue to exist without interruption or change. Therefore, in all respect, I adhere to my prior decision in this matter and rule that the Connecticut Board of Pardons furnish any member of the plaintiff class a written statement of reasons and the facts relied on when he is denied a pardon.

SO ORDERED.

Dated at Hartford, Connecticut, this 18th day of August, 1978.

M. JOSEPH BLUMENFELD
United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

DAVID DUMSCHAT

Plaintiff

JAMES BROWN, STANLEY CZAJA and JAMES SHELTON

Intervening Plaintiffs

v.

BOARD OF PARDONS, State of Connecticut; and RICHARD K. LUBLIN (Chairman), ALVIN DOZEMAN, PAUL J. McQUILLAN, JOHN P. COTTER, and MICHAEL E. DuBISSETTE, individually and in their capacities as members of the Board of Pardons

Defendants

CIVIL NO. H76-102

JUDGMENT

The above-identified action having come on for rehearing before the Court by the Honorable M. Joseph Blumenfeld, United States District Judge, after remand from the Court of Appeals; and,

The Court, having certified the action as a class action and after a hearing on the intervening Plaintiffs' requests for relief, filed its Memorandum of Decision ruling that the Connecticut Board of Pardons furnish any member of the Plaintiff class a written statement of reasons and the facts relied upon when such member of the Plaintiff class is denied a pardon by the Board.

It is therefore accordingly ORDERED and ADJUDGED that Judgment enter and hereby does enter for the Plaintiff class and that the Connecticut Board of Par-

dons furnish any member of the Plaintiff class a written statement of reasons and facts relied upon when such member of the Plaintiff class is denied a pardon by the Board.

Dated at Hartford, Connecticut, this 22nd day of September, 1978.

SYLVESTER A. MARKOWSKI
Clerk, United States District Court

By: WILLIAM D. TEMPLETON
Chief Deputy

APPROVED:

M. JOSEPH BLUMENFELD
United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

JAMES BROWN, STANLEY CZAJA
and JAMES SHELTON

v.

BOARD OF PARDONS, State of Connecticut, and PAUL J. McQUILLAN (Chairman), ALVIN DOZEMAN, MICHAEL E. DuBISSETTE, JOHN SPEZIALE, and PHILIP TATOIAN, Members of the Board of Pardons

CIVIL ACTION NO. H77-657

JUDGMENT

The above-identified action came on for consideration by the Court by the Honorable M. Joseph Blumenfeld, United States District Judge; and,

The Court having consolidated this action with co-pending Civil No. H76-102 for disposition; and,

The Court having granted the Plaintiffs' Motion to Intervene in said co-pending action, Civil No. H76-102; and,

The Court, after a hearing in said consolidated actions on the intervening Plaintiffs' requests for relief, filed its Memorandum of Decision ordering that the Connecticut Board of Pardons provide any member of the Plaintiff class a written statement of reasons and facts relied upon when such member is denied a pardon by the Board;

It is therefore accordingly ORDERED and ADJUDGED that Judgment enter and hereby does enter for the Plaintiffs and that the Connecticut Board of Pardons provide any member of the Plaintiff class with a written

statement of reasons and facts relied upon when such Plaintiff class member is denied a pardon by the Board.

Dated at Hartford, Connecticut, this 22nd day of September, 1978.

SYLVESTER A. MARKOWSKI
Clerk, United States District Court

By: WILLIAM D. TEMPLETON
Chief Deputy

APPROVED:

M. JOSEPH BLUMENFELD
United States District Judge